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MUHAMAD AMIR LOKMAN AMIRNUDDIN (SEORANG BUDAK DAN MENDAKWA MELALUI IBU DAN SAHABAT WAKILNYA NOR HAMSIAH AHMAD LATHIN) v. HASLINA HASHIM & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
AKHTAR TAHIR J
[CIVIL SUIT NO: WA-21NCVC-56-07-2018]
27 MAY 2022

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Abstract – *Medical personnel owe a duty of care to ensure a patient gets an expeditious treatment for injury suffered, either to cure it or, at the very least, to mitigate any loss which might be suffered due to a delay in the treatment. In this case, a botched circumcision and failed attempt to re-attach the parts, failure to undertake a proper procedure and subsequent delay in the transfer of the patient to another hospital for an expeditious surgery showed breach of duty of care by the hospital staff and the medical personnel. The patient, who suffered emotional and physical implications, was thus entitled to special, general, exemplary and punitive damages as a result of the negligence.*

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TORT: *Negligence – Medical negligence – Botched circumcision carried out by employee of hospital – Patient transferred to another hospital for surgery after examination and completion of formalities – Whether delay in transfer and subsequent surgery extinguished hope for successful surgery – Whether medical personnel breached duty of care to provide expeditious treatment – Whether losses suffered by patient was direct result of negligence by medical personnel*

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TORT: *Vicarious liability – Liability of Government – Medical negligence – Botched circumcision and subsequent delay in transfer to another hospital for surgery – Whether delay extinguished hope for successful surgery – Whether medical personnel breached duty of care to provide expeditious treatment – Whether losses suffered by patient was direct result of negligence by medical personnel – Whether Government vicariously liable for negligence of medical personnel*

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Mohamad Zawawi ('SP3'), who was employed at the Kuala Lipis Hospital, while carrying out a circumcision on the plaintiff, a child of ten years of age, had inadvertently cut off the entire tip of the penis, called the gland penis. As there was no micro surgeon at the Kuala Lipis Hospital, arrangements were made to transfer the plaintiff to the Selayang Hospital. Before the plaintiff was sent to Selayang Hospital, he was examined and other formalities were carried out by the first defendant, the medical officer in charge at the Kuala Lipis Hospital. Subsequently, the operation to re-attach the tip of the penis, which was done some ten hours after the botched circumcision, was unsuccessful. The plaintiff was left with the stump of the

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penis without the tip, causing him to suffer from numerous implications, emotional as well as physical. The plaintiff claimed against the medical officers for damages arising out of the medical negligence for the delay in carrying out the treatment and against the Government of Malaysia for vicarious liability.

Held (allowing plaintiff's claim):

(1) There was a clear relationship between the plaintiff and the defendants, established the moment SP3 was asked to perform the circumcision on the plaintiff. Whereas the relationship between the plaintiff and the other medical personnel was established the moment the plaintiff was admitted to their care for treatment. The duty of care of the medical personnel in the Government Hospital was to ensure that the plaintiff gets and expeditious treatment for the injury suffered to either cure the injury or at the very least, mitigate any loss which might be suffered in any delay in the treatment. Hence, SP3 and the medical personnel did owe a duty of care towards the plaintiff. (paras 14, 16 & 17)

(2) The non-explanation by SP3, who was no novice, as to why he cut off the entire tip of the penis, constituted an admission of breach of duty in carrying out the circumcision. SP3 further breached his duty by proceeding to re-attach the tip of the penis on his own, by stitching it. The proper procedure was for SP3 to preserve the tip of the penis as an attachment of the detached piece could only be carried out by a qualified micro surgeon. (paras 3, 19-21)

(3) The delay by the concerned medical personnel in attending to the plaintiff's injury had extinguished all hopes of a successful surgery in saving the injured part of the plaintiff. The first defendant, the medical officer in charge at the Kuala Lipis Hospital, being aware that there was no micro surgeon at the hospital, delayed the transfer of the plaintiff to the Selayang Hospital and, therefore, breached her duty of care to provide a prompt treatment. Further delay occurred when the medical personnel at the Selayang Hospital, despite being informed about the transfer of plaintiff, did not take steps to prepare for a possible surgery. The first defendant and the other medical officers who attended to the plaintiff had, therefore, breached their duty of care and was negligent in carrying out their duties and caused losses to the plaintiff. (paras 22-25, 28 & 30)

(4) As the losses suffered by the plaintiff was a direct result of the negligence of the defendants, the plaintiff was entitled to claim damages from all the defendants. There was a flagrant disregard by the defendants to ensure speedy treatment as well as showing complete apathy to the injury suffered by the plaintiff. The court thus awarded exemplary damages and punitive damages. The court thus allowed (i) special

damages in the sum of RM108, 356; (ii) general damages in the sum of RM2 million; (iii) RM500,000 each for exemplary and punitive damages; and (iv) costs of RM100,000. (paras 31, 37 & 40)

(5) The medical personnel were all employees of the Government of Malaysia and, therefore, by the principle of vicarious liability, the Government of Malaysia was vicariously liable for the losses suffered by the plaintiff. Further, SP3 had done such circumcision before outside the hospital and therefore, he could be said to have carried out his duties with the consent of the Kuala Lipis Hospital or, at the very least, the hospital which was a Government Hospital, had condoned his act. (paras 38 & 39)

Case(s) referred to:

Caparo Industries Plc v. Dickman [1990] 1 All ER 568 ***(refd)***

Projek Lebuh Raya Utara-Selatan Sdn Bhd v. Kim Seng Enterprise (Kedah) Sdn Bhd [2013] 6 CLJ 958 CA ***(refd)***

Zulhasnimar Hasan Basri & Anor v. Dr Kuppu Velumani P & Ors [2017] 8 CLJ 605 FC ***(foll)***

For the plaintif - M/s Mohamad Zainuddin & Co
For the defendants - Senior Federal Counsel

Reported by S Barathi

JUDGMENT

Akhtar Tahir J:

Introduction

[1] The plaintiff's claim against the defendants is for damages arising out of medical negligence in a botched circumcision.

Brief Facts

[2] The circumcision on the plaintiff, a child of ten years of age, was carried out by one Mohamad Zawawi bin Husein who was employed at the material time at the Kuala Lipis Government Hospital. The said Mohamad Zawawi was first named as the first defendant but the plaintiff elected to discontinue the case against him as the matter was settled between them out of the court. The said Mohamad Zawawi was called as a witness for the plaintiff as SP3.

[3] In carrying out the circumcision, the SP3 inadvertently cut-of the entire tip of the penis which is called the gland penis. The cut out part of the penis was recovered and SP3 attempted to attach it back by stitching it back. The incident happened at about 10.30 in the morning.

[4] SP3 had informed the Kuala Lipis Hospital and was advised to bring the plaintiff to the Hospital. At the Kuala Lipis Hospital, the plaintiff was examined as well as other administrative formalities were carried out by the first defendant.

[5] Knowing that there was no micro surgeon at the Kuala Lipis Hospital arrangements were made to transfer the plaintiff to the Selayang General Hospital.

[6] By the time the plaintiff arrived at the Selayang Hospital, it was already noon. There was further examination at the Selayang Hospital but the plaintiff was only operated upon towards evening some ten hours after botched circumcision.

[7] However, the operation was unsuccessful in reattaching back the tip of the penis leaving the plaintiff with the stump of the penis without the tip. This has caused numerous implications emotional as well as physical to the plaintiff for which he is now claiming compensation.

[8] The plaintiff's claim against the medical officers for a delay in carrying out the treatment resulting in the unsuccessful attempt to reattach the gland penis.

[9] Further the Government of Malaysia is added as a defendant for being vicariously liable for the negligence of its employees.

The Issues

[10] In the court's view the main issues for determination for in this case were whether there was negligence on the part of the defendants who were employed at the Government Hospitals in the botched circumcision of the plaintiff and could the Government of Malaysia be held liable vicariously for the negligence of its employees?

Negligence Under The Law

[11] It is trite law to prove negligence under the law, the plaintiff has to show that the defendants owed him a duty of care and that they had breached this duty of care resulting in the loss suffered by the plaintiff.

[12] In *Projek Lebuh Raya Utara-Selatan Sdn Bhd v. Kim Seng Enterprise (Kedah) Sdn Bhd* [2013] 6 CLJ 958 at 984; [2013] 5 MLJ 360 at 382, the Court of Appeal explained:

> [67] Negligence is a tort and three things must be proved to support the claimant's claim:
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> (a) that the defendant owes the claimant plaintiff a duty of care;
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> (b) that the defendant is in breach of that duty of care; and
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> (c) that the claimant plaintiff suffers damage as a result of that breach of duty and that damage is not too remote.

Duty Of Care

[13] Under the law relationship between the parties determines the duty of care. Where such relationship exists, then the element of duty of care is present.

[14] In this case, there is a clear relationship between the plaintiff and the defendants. The relationship between the plaintiff and SP3 was established the moment SP3 was asked to perform the circumcision on the plaintiff. The relationship between the plaintiff and the other medical personnel was established the moment the plaintiff was admitted to their care for treatment.

[15] The extent of the duty of care against SP3 was to perform the circumcision with utmost care and skill which is required. SP3, in his testimony, he confirmed that he had carried out such circumcision before.

[16] The duty of care of the medical personnel in the Government Hospital was to ensure that the plaintiff gets an expeditious treatment for the injury suffered to either cure the injury or at the very least mitigate any loss which might be suffered in any delay in the treatment.

[17] In short SP3 as well as the medical personnel did owe a duty of care towards the plaintiff and it was for the court to determine whether this duty of care was breached following the normal standards of medical care needed to treat such injuries.

[18] In the judgment of Lord Bridge in *Caparo Industries Plc v. Dickman & Ors* [1990] 1 All ER 568 at pp. 617 to 618, His Lordship said that:

> What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.

Breach Of Duty Of Care

[19] The breach of duty of care against SP3 was apparent as he could not explain during his testimony in court why he cut off the entire tip of the plaintiff's penis during the circumcision. SP3 was no novice, as according to his own testimony, he had carried out such circumcision before under similar conditions outside the hospital.

[20] The court viewed this non-explanation by SP3 as to why he cut off the entire tip of the penis, as an admission of breach of duty in carrying out the circumcision.

[21] Apart from negligence in carrying out the circumcision, SP3 also breached the duty of care in not preserving the tip of the penis but proceeding to reattach the tip on his own. There was the evidence given by other medical personnel in court *ie*, SP5 and SD5 during their testimony that the proper

procedure that SP3 should have undertaken, was not to attempt to reattach but to preserve the tip of the penis. An attachment of the detached piece could only be carried out by a qualified micro surgeon.

[22] It is an undisputed fact that there was no micro surgeon in the Kuala Lipis Hospital yet the first defendant being the medical office in charge at the Kuala Lipis Hospital who was aware of this fact, proceeded to examine the plaintiff and spend time in noting down the history and completing other formalities before clearing the plaintiff to be sent to the Selayang Hospital.

[23] SP3 had testified that he had informed the Kuala Lipis Hospital about the botched circumcision at 10.45am. The Kuala Lipis Hospital having been so informed should have immediately prepared an ambulance to send the plaintiff to the Selayang Hospital.

[24] By delaying the transfer of the plaintiff to the Selayang Hospital and instead spend time in completing trivialities, the court finds the first defendant, the medical officer at the Kuala Lipis Hospital to have breached her duty of care to provide prompt treatment.

[25] There is further testimony in this case that the Selayang Hospital had been informed about the transfer of the plaintiff yet the medical personnel did not take steps to prepare to for a possible surgery. There was further delay in carrying out the surgery which was carried out late in the evening some ten hours after the incident. The court finds that the medical personnel in the Selayang Hospital to have breached their duty of care in delaying the surgery.

[26] The court takes note of the fact that there are two different views in the testimony of the experts called in this case. One view is that the delay was of no consequence as the extent of injury was such that it was impossible to carry out a successful surgery even if the surgery was done immediately.

[27] However the court chose to accept the testimony of the experts SP5 and SD5 that testified that a delay in the surgery had caused the impossible situation of a successful surgery. In fact, SD5 who testified that the surgery should have been done promptly to increases the chances of success, was called by the defendants themselves.

[28] It is the court's finding the delay by the concerned medical personnel in attending to the plaintiff's injury had extinguished all hopes of a successful surgery in saving the injured part of the plaintiff.

[29] In determining the breach of duty of care in this case, the court finds the decision in the Federal Court case of *Zulhasnimar Hasan Basri & Anor v. Dr Kuppu Velumani P & Ors* [2017] 8 CLJ 605 is relevant to be applied here. In this case the Federal Court concluded as follows:

A [94] Thus, it is our judgment that in respect of the standard of care in medical negligence cases, a distinction must be made between diagnosis and treatment on the one hand and the duty to advise of risks on the other. This is because diagnosis and treatment are purely in the realm of medicine and that in the field of medicine, there are genuine differences of professional opinion in respect of diagnosis and treatment. Although B as a discipline, medicine involves specific knowledge, its practice, however, often does not admit to scientific precision. It is not always the case that there is a definite answer one way or the other. In fact, medical experts do genuinely and frequently differ in opinion on diagnosis and treatment.

[95] Given the fact that there are genuine differences in opinion in C diagnosis and treatment, it is therefore not a matter that the court can, or is, equipped to resolve. It is in this context that the *Bolam* test makes good sense. It requires the court to accept, not just the views of medical experts simpliciter, but the views of a responsible body of men skilled in that particular discipline. It removes from the courts the responsibility of resolving a dispute that is not equipped to resolve.

D [96] On the other hand, different consideration ought to apply to the duty to advise of risks as opposed to diagnosis and treatment. That duty is said to be noted in the right of self-determination. As decided by the Australian High Court in *Rogers v. Whitaker* and followed by this court in *Foo Fio Na*, it is now the courts' (rather than a body of respected medical E practitioners) which will decide whether a patient has been properly advised of the risks associated with a proposed treatment. The courts would no longer look to what a body of respectable members of the medical profession would do as the yardstick to govern the standard of care expected in respect of the duty to advise.

F **[30]** The court therefore concludes that the first defendant and the other medical officers who had attended to the plaintiff to have breached the duty of care and were therefore negligent in carrying out their duties and this had caused all the losses suffered by the plaintiff.

Damages

G **[31]** The court rules that the losses suffered by the plaintiff is as a direct result of the negligence of the defendants. The plaintiff is entitled to claim damages from all the defendants.

[32] The main loss suffered by the plaintiff is the loss of the most valuable H asset a man can have. There is definitely nothing that can replace this loss. All the shame and humiliation the plaintiff suffers is a result of this terrible loss.

[33] The mother had testified that since the age of ten, the plaintiff has entered into a shell and finds it hard to interact with others let alone develop I a courage to ever marry. Even if the plaintiff develops the courage in the court's view, no women knowing the plaintiff's condition will want to marry him.

[34] The expert seems to indicate that since the shaft of the penis is intact, he could still ejaculate and chances of having sexual intercourse are possible as well as chance to reproduce.

[35] However, on the other hand, the testimony of the experts in totality is that the plaintiff will have no sensation at the tip of the penis which is important for ejaculation and it goes without saying that even if the plaintiff ejaculates, he will feel no pleasure as all the sensation of pleasure is at the tip.

[36] It is clear that no amount of financial award given by the court will compensate the loss suffered by the plaintiff. Notwithstanding that the court must award a sum of money which will to certain extent lessen the burden of the plaintiff and his family as well as rehabilitate the plaintiff into instilling confidence in him to re-join the society as a normal person.

[37] In this case, as there was a flagrant disregard by the defendants to ensure speedy treatment as well as showing complete apathy to the injury suffered by the plaintiff, the court thought it fit to also award exemplary damages and punitive damages.

Vicarious Liability

[38] It is an undisputed fact that all the medical personnel who were negligent in carrying out their duties were the employees of the Government of Malaysia and therefore by the principle of vicarious liability the Government of Malaysia is vicarious liable to pay for the losses suffered by the plaintiff.

[39] The person who perpetrated the negligence was SP3. It is clear from his testimony that he had carried out the circumcision with the knowledge of his employers. He had done such circumcision before outside the hospital and therefore he could be said to be carrying out his duties with the consent of the Kuala Lipis Hospital or the very least the Kuala Lipis Hospital which is a Government Hospital condoned his act.

Conclusion

[40] Taking into account the above factors, the court allowed the special damages as pleaded to the sum RM108,356, a sum of RM2 million for general damages and RM500,000 each for exemplary and punitive damages and a cost of RM100,000.

[41] The court also allowed 5% interest on the special damages from the date of service of the writ until full payment and a 5% interest on other damages from the date of writ until the date of judgment.